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THE GRAND EXPERIMENT

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The Osgoode Society is supported by a grant from  
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THE  
GRAND EXPERIMENT  
  
LAW AND LEGAL CULTURE IN  
BRITISH SETTLER SOCIETIES

*Edited by*  
*Hamar Foster, Benjamin L. Berger, and A.R. Buck*



**UBC**Press • Vancouver • Toronto

Published for the Osgoode Society for Canadian Legal History by UBC Press

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16 15 14 13 12 11 10 09 08 5 4 3 2 1

Printed in Canada on acid-free paper.

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### Library and Archives Canada Cataloguing in Publication

The grand experiment : law and legal culture in British settler societies /  
edited by Hamar Foster, Benjamin L. Berger, and A.R. Buck.

(Law and society, ISSN 1496-4953)

Includes bibliographical references and indexes.

ISBN 978-0-7748-1491-1

I. Law – Great Britain – Colonies – History. 2. Law – Great Britain – History. I. Foster, Hamar, 1948- II. Berger, Benjamin L., 1977- III. Buck, A. R. IV. Osgoode Society for Canadian Legal History V. Series: Law and society series (Vancouver, B.C.)

KD5020.G73 2008

349.41

C2008-903338-8

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### Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada through the Book Publishing Industry Development Program (BPIDP), and of the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Aid to Scholarly Publications Programme, using funds provided by the Social Sciences and Humanities Research Council of Canada.

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

604-822-5959 / Fax: 604-822-6083

[www.ubcpres.ca](http://www.ubcpres.ca)

FOR JOHN PETER SOMERSET McLAREN

*Legal historian, colleague, teacher, friend ... and unrepentant Morris dancer*



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## FOREWORD

### *The Osgoode Society for Canadian Legal History*

IN RECENT years Canadian legal historians have shown an increasing interest in imperial themes and the comparative legal history of British colonies, and this book reflects that interest in comparing ourselves with other settler colonies. It examines the legal cultures of former British colonies, principally Canada, Australia, and New Zealand, although there is also some discussion of the United States and South Africa, and covers such topics as dowry, prohibition, libel law, and the clash of colonial and indigenous legal regimes. Its themes are how local life and culture in selected colonies influenced, and was influenced by, the ideology of the rule of law that accompanied British colonialism, and it includes examination of the much-neglected question of the extent to which British courts took note of the decisions made by courts in the settler dominions. The volume is rich in empirical detail and ends with a reflection on the state and future of the discipline by Professor John McLaren.

The purpose of the Osgoode Society for Canadian Legal History is to encourage research and writing in the history of Canadian law. The Society, which was incorporated in 1979 and is registered as a charity, was founded at the initiative of the Honourable R. Roy McMurtry, formerly attorney general for Ontario and chief justice of the province, and officials of the Law Society of Upper Canada. The Society seeks to stimulate the study of legal history in Canada by supporting researchers, collecting oral histories, and publishing volumes that contribute to legal-historical scholarship in Canada. It has published seventy books on the courts, the judiciary, and the legal profession, as well as on the history of crime and punishment, women and law, law and economy, the legal

FOREWORD

treatment of ethnic minorities, and famous cases and significant trials in all areas of the law.

Current directors of the Osgoode Society for Canadian Legal History are Robert Armstrong, Attorney General Chris Bentley, Kenneth Binks, Patrick Brode, Brian Bucknall, David Chernos, Kirby Chown, J. Douglas Ewart, Martin Friedland, John Honsberger, Horace Krever, Ian Kyer, Gavin MacKenzie, Virginia MacLean, Roy McMurtry, Jim Phillips, Paul Reinhardt, Joel Richler, William Ross, Paul Schabas, Robert Sharpe, James Spence, Mary Stokes, Richard Tinsley, and Michael Tulloch.

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## ACKNOWLEDGMENTS

THE EDITORS would like to thank Lyndsay Watson and Rosemary Garton for their assistance in bringing this book to press and to acknowledge the financial support of the University of Victoria, Macquarie University, the Faculty of Law at the University of Victoria, and the Social Sciences and Humanities Research Council of Canada. We would also like to thank Professors W. Wesley Pue of the University of British Columbia and Robert Menzies of Simon Fraser University for organizing the 2005 “Law’s Empire” Conference, which produced the idea for this book, and for their help in securing funding.

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INTRODUCTION  
DOES LAW MATTER?  
THE NEW COLONIAL LEGAL HISTORY

*Benjamin L. Berger, Hamar Foster, and A.R. Buck*

THE HISTORIAN E.P. Thompson eloquently expressed the awkwardness surrounding law, particularly the elusive notion of “the rule of law.” He readily conceded that, “in a context of gross class inequalities, the equity of the law must always be in some part sham” and that, when transplanted to a colonial context, it could well become an instrument of imperialism. But he maintained nonetheless that “the rules and categories of law penetrate every level of society,” and its forms and rhetoric “may, on occasion, inhibit power and afford some protection to the powerless.” For his part, Thompson concluded that, if “law is no more than a mystifying and pompous way in which class power is registered and executed, then we need not waste our labour studying its history and forms.” But he did, and we do. And we do it because—to quote Thompson one more time—“law *matters*.”<sup>1</sup>

Talk of the “rule of law” is everywhere today, and scholarship about its nature and what it requires of societies that profess to enjoy it has loomed large in discussions about constitutional development and the international political order. What is it? Who has it? How can we create it? But the concept is no longer reserved for political philosophers and students of jurisprudence. The idea of the rule of law has found its way into the carefully prepared speeches of politicians, media commentary about world events, and, increasingly, everyday discussions about contemporary issues. In these uses, the concept has become closely associated with notions of constitutionalism, of human rights, and of stable democratic government, to be contrasted with dictatorial and oppressive forms of rule.

But the meaning or content of the rule of law is less clear, and the fog descended early. According to Albert Venn Dicey, the jurist whose name is most associated with the concept, the rule of law, at a minimum, includes three basic elements. The first is that no one may be subject to a civil or criminal penalty “except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.” The second is that no one is above the law and everyone is subject to “the ordinary law of the realm and amenable to the jurisdiction of the ordinary courts.” And the third is that the general principles of the constitution are “with us the result of judicial decisions determining the rights of private persons in particular cases,” not the product of a priori principles.<sup>2</sup> The third of Dicey’s principles is peculiarly English, but the first two are widely accepted and have engendered debate about such issues as anti-terrorism legislation, Aboriginal rights, and administrative law in general.<sup>3</sup> Some have taken a different tack in approaching this protean concept, expanding upon and catholicizing, rather than critiquing, the formal Diceyan requirements. These scholars have imagined that the rule of law imposes robust substantive requirements amounting to a minimum degree of “equity” within the law.<sup>4</sup> The rule of law has even been deployed in Canada, for example, as an unwritten constitutional principle capable of invalidating legislation.<sup>5</sup>

But the ubiquity of the concept has not only made the definition of the rule of law elusive; its uniform rhetorical acceptance has often veiled the concrete realities of living under it. This rhetoric occludes the meaning of living within the culture of law’s rule, including the dynamics of local power, economics, exclusion, resistance, and transformation that exist beneath the surface of even the most pristine and venerable traditions of the rule of law.<sup>6</sup> The rule of law thus matters deeply but hides much.

Thompson, a social historian, was criticized by some of his colleagues on the Left for this apparent privileging of law. But the situation is even trickier for legal historians, who cannot avoid such privileging without ceasing to *be* legal historians. For the most part, however, they have done so mindful not only of the value of the rule of law but also of its ideological function and its potential for what Thompson called “sham.” In a number of ways, the chapters in this collection all take this lesson to heart, attempting both to show the way in which law is sham — meaning the way in which historical, economic, social, and local realities serve to shape and even distort the meaning of the rule of law at a given time in a given place — and the extent to which law matters.



One Canadian legal historian who has been engaged for years in the task of peeling away the veneer of the rule of law to reveal the messy ways in which all of this has “mattered” is John McLaren. Whether considering the manner in which the rule of law has interacted with religious cultures in Canada, with the historical injustices perpetrated by colonial legislatures, or with the realities of the administration of colonial law, John’s work has consistently asked hard questions and offered illuminating answers about the nature of the rule of law in the British Empire.<sup>7</sup> John has also been a tireless advocate of the importance of this sort of legal history to legal education in these former colonies, a commitment that is strikingly demonstrated in the creation of a colonial legal history course at the University of Victoria that is a web-based joint venture with the University of British Columbia, the Australian National University in Canberra, and Macquarie University in Sydney.<sup>8</sup> Above all, John has been instrumental in making legal history a transboundary, comparative, contextually sensitive, and collective enterprise involving colleagues both inside and outside Canada.

This was acknowledged at the “Law’s Empire” Conference at Harrison Hot Springs, British Columbia, in June of 2005. At the session titled “Themes in Comparative Colonial Legal History,” scholars from Canada, the United States, New Zealand, and Australia collected to honour John McLaren and to build upon his contributions to legal history. The idea for this volume was born at that conference, a volume that would draw on the work of legal historians who have been in the vanguard of the comparative and contextual approach to our mutual legal past. In this way, we would honour not only John’s contribution to the field but also his pioneering efforts to have legal historians in these various jurisdictions speak to one another and even, increasingly, to work together.

The essays that follow also reflect the exciting new directions in which legal history in the settler colonies of the British Empire has developed in the last two decades. Recent publications such as *Despotic Dominion: Property Rights in British Settler Societies; Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955*; and *Law, History, Colonialism: The Reach of Empire* attest to the contemporary flourishing of legal history in these former colonies.<sup>9</sup> If more evidence is needed, one need look only at the scholarly journal *Legal History* (formerly the *Australian Journal of Legal History*) and the many volumes published by the Osgoode Society for Canadian Legal History and in the Law and Society Series of UBC Press. There clearly is a “new colonial legal history,” and it is exemplified

in this volume. No longer a narrowly construed doctrinal history for lawyers—although getting the law “right” is obviously critical—the “new” legal history has been particularly attentive to the social and cultural context in which legal institutions and actors have operated. As Keith Smith and John McLaren explain, this new legal history is focused on the “investigation of cultural factors, social forces and values, ideological and intellectual impulses and political and economic realities. In turn it takes account of the impact of law and legal culture on intellectual thought and on the community and life more generally.”<sup>10</sup>

Set within this frame, the question is not simply what the law *was* but what the law *meant* to the communities that engaged and lived within it. This has involved close attention to the details of local culture, geography, biography, and politics, and how these have inflected and refracted the rule of law. It is in this sense that the chapters in this volume all reflect the profoundly contextual nature of this new colonial legal history. In fact, the notion of “contextual” colonial legal history echoes a distinction that has long been drawn between “internal” and “external” legal history generally. The former stays “in the box,” concerning itself with matters purely legal; the latter addresses itself to the law and its relation to society. But as John McLaren and one of the editors of this volume wrote nearly fifteen years ago,

[T]hese approaches should not be mutually exclusive. Legal history that neglects the wider context risks misunderstanding or ignoring altogether the forces that shaped both the legal rules and the events to which they were applied. But, equally, legal history that slights cases, statutes, regulations and the legal profession begs a crucial philosophical question by assuming without proof that the law, as a Marxist might say, is mere superstructure ... Whether one sees oneself as doing “legal” history or not, the institutions of the law and the activities of those who work within them cannot be divorced from broader cultural influences; but neither can these influences be treated as though the law were a mere appendage.<sup>11</sup>

The chapters that follow reflect this advice by treating the law as intimately connected to, influenced by, and expressive of its environment without relegating it to mere epiphenomenon, determined entirely by other forces.

They do so within a particular context, one that involves two more concepts that are very much on the minds of people today: colonialism and empire. George Orwell, reflecting in 1936 on an experience he had during his stint with the Burmese Colonial Police, reported that he had decided early on that imperialism—by which he presumably meant colonialism as well—“was an evil thing.” But, he added, “I was young and ill-educated ... I did not even know that the British Empire is dying, still less did I know that it is a great deal better than the younger empires that are going to supplant it.”<sup>12</sup> Recently, historian Niall Ferguson has gone Orwell one better. He concludes that the British Empire may even have been, on balance, a good thing and that if the American empire is to do as well it must first face up to the fact that it is one. He is also careful to point out that British successes were often due as much to luck as to planning. British ascendancy over Spain, for example, was apparently due to tardiness! Because it was a “latecomer to the imperial race, [Britain] had to settle for colonizing the unpromising wastes of Virginia and New England, rather than the eminently lootable cities of Mexico and Peru.” So, instead of engaging in plunder, the colonists focused on establishing effective and durable institutions.<sup>13</sup> In the nineteenth century, the fundamentals of these institutions, however imperfectly realized on the ground, were among the things that the settlers, merchants, and their local governments had left behind in England: parliamentary supremacy, the rule of law, and the common law tradition generally.

Of course, one can conclude that the British Empire was a good thing only if one is comparing it to what other imperial powers did or might have done, not if one is trying to imagine how Britain might have done better or how a world untainted by imperialism might look. Many theorists approach this question from the latter standpoint and, as a result, colonialism has—apart perhaps from railways in India and the business about the rule of law—generally been regarded as having been, on the whole, a bad thing. Evidence of this, from the Battle of Omdurman to the massacre at Amritsar, is substantial. But in the countries whose legal history is addressed in this book—primarily Canada, Australia, and New Zealand, but also South Africa and the United States—the British Empire and the colonialism it engendered are inescapable historical facts.

Faced with this irreducible reality, legal historians have tended to eschew the more utopian approach of the theorists. Although, when they use the term “colonialism,” an unmistakable odour definitely clings to

it, they have chosen to examine its complex and often messy workings on the ground instead of engaging in abstract and wholesale condemnations. In particular, they have looked at how, and how well, the transplanted apparatus of the British legal system has adapted to its various new surroundings. Some have focused on how colonial and imperial law might have, for all its rhetorical splendour, facilitated a kind of plunder that differed from the Spanish variety: the evils of the slave trade, for example, or the appropriation of indigenous lands and resources. Others have looked at how, as Barry Wright puts it in Chapter 1, the “incomplete implementation of the British Constitution” in colonial societies led to opposition, legal repression, and, occasionally, rebellion. Some have even wondered whether an empire whose gubernatorial instructions were usually framed in terms of “peace, order, and good government” was as concerned with “law” as has been supposed.<sup>14</sup>

Nor have legal historians confined themselves to colonies, narrowly defined. British Columbia, for example, was a British colony until 1871, when it joined Canada. Was it a colony after that? Was Canada? If so, when did this status end? With the Battle of Vimy Ridge in 1917? With the *Statute of Westminster* in 1931? With Canada’s separate declaration of war against Germany in 1939? What about when appeals to the Judicial Committee of the Privy Council were abolished in 1949? Or was it not until the passage of the *Canada Act* in 1982? A similar problem arises in connection with colonial status in Australia. Constitutionally, the Australian colonies threw off their colonial shackles with Federation in 1901. But did that mean Australia lost its colonial status entirely? Or did that status survive, only to end on the beaches of Gallipoli in 1915? Or after the fall of Singapore in 1942? In terms of law, did that colonial status end only in 1986 with the passage of the *Australia Act*, which abolished appeals to the Privy Council? Has it ended yet?

All of the contributors to this volume would no doubt agree that the colonial nature of the jurisdictions they discuss persisted long after each one ceased, formally, to be a colony. Most would go further and assert that patterns and structures dating from the colonial period continue to inform social, economic, and political relations in these jurisdictions today. This is certainly true with respect to the place of indigenous peoples, who are the subject of Chapters 3, 7, and 13. It also explains why two other essays — Chapters 5 and 9 — reach well into the twentieth century. As Stevens, a character in William Faulkner’s play *Requiem for a Nun*, famously remarked, “The past is never dead. It isn’t even past.”

A virtual corollary to this contextual turn in colonial legal history has been an increased interest in, and attention to, the comparative study of the rule of law in the former British Empire. In certain respects, the call to legal history as necessarily a comparative enterprise is not a new one. Well over a century ago, Frederic William Maitland announced that “[h]istory involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history ... [T]here is nothing that sets a man thinking and writing to such good effect about a system of law and its history as an acquaintance however slight with other systems and their history.”<sup>15</sup> This admonition has particular force with respect to the history of the rule of law in British settler societies. No matter how parochial, the magisterial nature of the British rule of law and its imperial posture meant that there was a relatively uniform sense of the kinds of institutions of law and governance that ought to order these colonies — notwithstanding that they were separated not only by vast distances but also by substantial local, cultural, geographical, and political differences. This aspiration to homogeneity is a great boon to the colonial legal historian who, with a comparative lens in place, is able to see the influence of context so very much more clearly.

Although only some of the chapters in this volume are explicitly comparative, all reflect this second aspect of the “new” colonial legal history: an awareness of developments in comparable jurisdictions. Chapters 1, 10, and 11, explicitly comparative in nature, compare and contrast one jurisdiction’s approach to an area of the law with that taken in another part of the common law “empire.” Chapter 5 ranges over four jurisdictions, relating how courts in England utilized the jurisprudence of each, and Chapter 7 compares the role of two leading jurists in one colonial jurisdiction. But all the essays draw on a body of colonial or imperial legal history that is by definition transboundary in scope. Prohibition in New Brunswick (Chapter 12) and Aboriginal title in British Columbia (Chapter 13) — to take but two examples — simply cannot be properly understood otherwise.

This methodological commitment to context and comparison in the study of the legal history of British settler societies underlies the several themes that are developed in this volume, themes that illustrate the complex relationship between law and the environment in which it operates, from discipline on the high seas (Chapter 2) to the circuit courts of Nova Scotia (Chapter 6) and the Tasmanian judiciary (Chapter 8), and

from the law of the fur trade in seventeenth-century Rupert's Land (Chapter 3) to perceptions of legal virtue in twentieth-century New Zealand (Chapter 7). All of these themes are, themselves, joined in their relevance to an appreciation of the broad concepts with which we began this introduction: colonialism and the rule of law.

One such theme is what might be called legal translation, that is, how different legal cultures, even very early on, received and translated common law doctrines in different ways.<sup>16</sup> The concept of legal culture, which the late Graham Parker discussed more than twenty years ago with respect to Canada, is of course central to how the common law was "translated" and forms the background to many of the chapters in this volume.<sup>17</sup> In two of them—dealing with the rule of law in colonial New South Wales (Chapter 4) and with legal traditions in the Cariboo and Peace River "countries" of British Columbia (Chapter 9)—it may even be said to move into the foreground, although this is of course a matter of degree. More specific examples of this theme of translation are to be found in Chapters 1 and 10, by Barry Wright and Lyndsay Campbell, who examine how the law of libel was adapted and transformed in Upper Canada, New South Wales, Nova Scotia, and Massachusetts, and in Chapter 11, in which Andrew Buck and Nancy Wright discuss the law of dower in New South Wales and the United States.

Another related theme is the importance of "local" histories. In Canada, British Columbia historian Tina Loo, invoking the work of anthropologist Clifford Geertz, drew attention some time ago to the importance of local understandings to how law is applied.<sup>18</sup> Some of the essays in this volume emphasize this as well. Jonathan Swainger, for example, wonders in Chapter 9 whether "localized notions of pragmatic sense" and the contributions of a particular judge created a regional legal tradition that, by the 1940s, clashed with modernity. In a way, Chapter 6, by Jim Phillips and Philip Girard, looks at the same phenomenon from the other end of the microscope, emphasizing as it does the transformation of the Supreme Court circuits in Nova Scotia from community event to government service. In Chapter 3, Janna Promislow puts a slightly different twist on this when she seeks to analyze a late twentieth-century Canadian judge's interpretation of late nineteenth-century Cree leadership by looking at how the Cree and the fur traders interacted in the seventeenth century. She concludes, in part, that "legal traditions are full of symbolism" and that if we fail to search the historical record for barely

discernible local meanings, we “will miss important signals of political and legal authority.” What seems just as clear when one reviews the historical record is that, whether it is a judge in Australia striking down statutes as repugnant to the laws of England, or one in British Columbia approving departures from the English norm due to “local circumstances,” the law and its various local interpretations were important ingredients in the bubbling cauldron of colonial politics.

Related to this focus on local histories is the role of biography, and particularly judicial biography, in the legal histories explored in this volume. It is notable how prominently the relationship between the colonial judiciary and the rule of law figures in these essays, a theme that itself strongly reflects the interests and influence of John McLaren.<sup>19</sup> For example, in Chapter 8, Stefan Petrow presents a detailed portrait of an early Tasmanian judge whose personal foibles, he argues, have unfairly overshadowed his more positive attributes. In the same vein, David Williams asks his readers to reassess how we assign praise and blame in the law when, in Chapter 7, he contrasts the careers of two New Zealand jurists, the “famous” Sir William Salmond and the “infamous” Chief Justice Sir James Prendergast. For those who specialize in the history of indigenous rights in the British Commonwealth, Williams’ discussion should be of particular interest. In Chapter 9, Jonathan Swainger profiles Judge H.E.A. Robertson. And although some might quarrel with the suggestion that a County Court judge in British Columbia in the first half of the twentieth century qualifies as “colonial,” we think he does. Certain judges, moreover, make appearances in more than one of these studies, notably Chief Justice Francis Forbes in New South Wales, thus attesting to the transboundary nature of the colonial legal enterprise.<sup>20</sup>

A fourth theme apparent in this volume is what might be referred to as law “at the boundaries,” that is to say, either at the outermost limits of the legal system or at least in its remoter backwaters. How the law operates in these regions may throw light not only on its performance at the margins but also on how lesser legal narratives may complement the dominant one—or undermine it by revealing the sham behind the rhetoric. Bruce Kercher’s examination, in Chapter 2, of the “power of masters to ensure discipline at sea” is an excellent example of this sort of thing and reveals an asymmetry between master and seaman that others have documented in the master-servant relationship on land.<sup>21</sup> In Chapter 13, two of us also tread on this territory and look at the role of

the Cowichan Petition of 1909 in the campaign to have Aboriginal title recognized in British Columbia in the early twentieth century. That the attempt failed says volumes about the reality behind the rhetoric of the rule of law at that time. What the apparent success of the late twentieth-century campaign for such recognition will amount to, in Canada and elsewhere, remains to be seen. But what cannot be doubted is that the rule of law exists in a state of tension with the interests of settler societies and their successors: it both legitimates the status quo and challenges it with principles that, instead of being put into practice, have often been allowed to moulder in old books. Responsible government, for example, was for settlers an indispensable boon; for indigenous peoples, it posed a considerable threat to any sort of respect for their Aboriginal rights and title. Indeed, where Aboriginal people are concerned, almost any example will do because colonialism, even when tempered by the rule of law, required indigenous people to choose sides. Does one fight for traditional rights or compromise with the new order?<sup>22</sup> Whether one is speaking about the law banning the potlatch in British Columbia or the Maori Land Court in New Zealand, the dilemma is the same.<sup>23</sup> Thompson would have understood this very well.

Finally, many of the chapters in this volume have to do with what may fairly be described as “constitutionalism”—not the formal constitutionalism of the “supreme” legal documents that guide so much law in contemporary liberal democracies but, rather, the more fundamental sense of the constitution as the way in which the legal order has been constructed in different parts of the world. As Karl Llewellyn put it, a “constitution” in the most meaningful sense of the word “may be summed up more or less adequately as the going scheme of government under which those who do it, do it; and those who get something out of it proceed about getting something out of it; and those who take it, take it—sometimes hard.”<sup>24</sup> Viewed in this way, the chapters discussing the relationship between colonial forces and Aboriginal communities, such as Chapter 3, by Janna Promislow, on the particular ways in which these relationships were negotiated between Aboriginal groups and traders in Rupert’s Land, and Chapter 13, on the Cowichan Petition of 1909, are quintessentially about constitutionalism in colonial legal history. This is also very much a theme of Chapter 12’s examination of the prohibition phenomenon and the Constitution in New Brunswick in the 1850s. The issue of how the practices and attitudes of governance develop in colonial societies is perhaps most squarely addressed in Chapter 4’s analysis of



what its authors call “common law constitutionalism” in the early development of Australia.

The essays in this collection explore these analytically rich themes in a comparative context that, for better or worse, would not be possible were it not for the existence of the empire that George Orwell, looking forward as well as back, damned with such faint praise. And although we readily concede that it is difficult to read Victorian prose these days with the seriousness of our ancestors (knowing as we do just how much “sham” was involved in the colonial enterprise), it nonetheless seems fitting to end with the concluding words of that masterpiece of legal history, Pollock and Maitland’s *The History of English Law*. Speaking of the fact that English and European law went their separate ways in the period covered by the book, the authors wrote,

Which country made the wiser choice no Frenchman and no Englishman can impartially say; no one should be judge in his own cause. But of this there can be no doubt, that it was for the good of the whole world that one race stood apart from its neighbours, turned away its eyes at an early time from the fascinating pages of the *Corpus Iuris*, and, more Roman than the Romanists, made the grand experiment of a new formulary system ... Those few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our children.<sup>25</sup>

We no longer speak so unabashedly of empire or invoke “race” in this fashion. But, warts and all, the common law was a system unto itself and it did spread—through settlement, conquest, and treaty—across the globe.<sup>26</sup> This volume tells a part of that story, a story about the very phenomenon that so awed Pollock and Maitland. And if we are honest with ourselves, this story astonishes us still—even if we cannot view the reach of empire with the apparent equanimity of some of our predecessors.

Whether deconstructing ideology or simply documenting the regular workings of a colonial legal system, the essays collected here reveal, we believe, that Thompson was right: no history can be complete without taking the law and its practitioners into account. Law, in other words,

does matter. And, thanks to the pioneering efforts of scholars such as John McLaren, the study of colonial legal history, in particular, has become an increasingly cosmopolitan undertaking, reaching across old imperial boundaries and engaging many in a common enterprise. As editors, we hope that this volume provides a context that not only enriches our understanding of that phenomenon but encourages others to join us in this rewarding task.

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PART ONE

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AUTHORITY AT THE BOUNDARIES  
OF EMPIRE



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CHAPTER ONE

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LIBEL AND THE COLONIAL  
ADMINISTRATION OF JUSTICE  
IN UPPER CANADA AND  
NEW SOUTH WALES, c. 1825-30

*Barry Wright*

IN THE past thirty or forty years, many historians have moved beyond the traditional narratives and accounts of empire, past the “culture cringe,” to focus on local and national struggles. This has brought important, previously marginalized experiences into focus, but at the risk, perhaps, of parochialism. In the case of British colonies with received English laws, and the self-governing dominions that emerged from them, there are imperial legal networks that warrant further research and offer enormous scope for new comparative legal historical scholarship. There are similar legal and constitutional issues, common imperial policy responses, and initiatives that involved more than directives from London but were also informed, as Bruce Kercher has pointed out, by ideas circulating among British jurisdictions, facilitated by the intercolonial migration of legal and political personnel.<sup>1</sup> None of this is to suggest the displacement of history from “below” by history from “above,” or the uncritical restoration of the Whiggish narratives about imperial policy reform and London’s enlightened promotion of the rule of law or responsible self-government in the face of recalcitrant colonial elites. Rather, it is about a better understanding of context.

John McLaren’s recent comparative overview of judicial controversies in colonial Australia and Canada illuminates the rich potential for contextualized comparative legal historical research.<sup>2</sup> This chapter elaborates his themes by way of a closer examination of parallel legal controversies around attempts to suppress political opposition and the independent press in the British North American colony of Upper Canada (present-day Ontario) and the Australian colony of New South Wales in the latter half of the 1820s. McLaren’s study of the issue of judicial independence

in both colonies in the first four decades of the nineteenth century highlights the prominence of the rule of law and related British constitutional claims. Such claims were used to challenge Upper Canada's ruling "Family Compact" and to contest its attempts to discredit and silence opposition. The New South Wales Governor's wide executive powers over the affairs of the convict colony, generally supported by the "Exclusives," triggered the same constitutional discourse as the "Emancipists," including former convicts, who struggled for rights and representative institutions. The courts in both colonies were a primary forum for political battles, and judges were at the centre of these conflicts. A study of attempts to suppress opposition and silence the press by seditious libel and related colonial legislation enables us to extend McLaren's comparative look at the judiciary to other contentious elements in the colonial administration of justice (prosecutions and the jury) and the opportunity to further explore the social and institutional pressures on local executives and their domination of law and politics.

Similarities in uses of the law to manage opposition and political expression, and contestation of these uses, not only reveal common legal and constitutional issues but also underscore the central place of law in the narratives of colonial political struggles, their emerging "public spheres," and imperial-colonial relations. Popular pressures from "below" and imperial pressures from "above" were important factors that influenced the course of events examined here. In Upper Canada the 1828 conviction of Francis Collins for seditious libel was the culmination of a series of prosecutions against opposition leaders and the press and was accompanied by the dismissal of Judge John Walpole Willis (who ended up on the New South Wales bench in 1837). Legislative Assembly demands for his reinstatement were petitioned to the British government along with related grievances, notably frustrated majority bills to repeal local legislated deportation powers over "seditious" aliens and recently arrived British subjects (the *Sedition Act*, 1804). During this same period, New South Wales saw the prosecutions of Robert Wardell (1827), Edward Hall (1828, 1829), and Attwell Hayes (1829), and legislative attempts to license the press (the "*Libel*" or "*Newspaper*" Acts, 1827, 1830) that included the punishment of banishment from the colony and other provisions that Chief Justice Francis Forbes (formerly Chief Justice of Newfoundland) refused to certify. The curbing of prosecutions and British legislative interventions (repeal of Upper Canada's *Sedition Act* in 1829 and disallowance of the New South Wales *Libel Act* in 1831) reflect common

patterns of pressures from above and below. Both colonies experienced the broadening of politically engaged public opinion supported by an independent press and increasingly articulate concerns about executive domination of law and politics and departures from the British Constitution. By the 1830s the prospects of successful legal repression were much reduced, constrained by the development of colonial public spheres and supported by the ascendancy of liberal reform interests in the British government and more critical scrutiny of colonial affairs.

## THE POLITICAL AND LEGAL CONTEXT

### British Background and English Criminal Law

The English criminal laws adopted in Upper Canada and New South Wales included the offence of seditious libel, the primary means British governments used to manage oppositional political expression and published criticism of the state in the eighteenth century and the first two decades of the nineteenth century. The late seventeenth-century constitutional compromises did not resolve issues around the legitimacy of organized political opposition, freedom of the press, and political expression as governments attempted to stem the erosion of deference to authority, and reformers attempted to secure these liberties. Even until the 1820s, British governments tended to share Edmund Burke's view that growing popular engagement and debate about politics and public policy, particularly as expressed in the "republic of letters," was a dangerous revolutionary stirring of popular opinion. What governments characterized as serious threats to the existing order were perceived by political opposition, and increasingly by the engaged public, as legitimate challenges to privileged control over politics and public policy. The eighteenth-century elaborations of sedition and criminal libel laws were a response to fears of developing connections between organized opposition and emerging broader public opinion, a widening engagement with political matters by means of voluntary associations and their processes of deliberative democracy, increasing popular literacy, and a growing independent press.<sup>3</sup>

The common law offence of seditious libel was prosecuted for publications that criticized the state on the basis that they promoted discontent and disaffection, although there was no need to prove actual incitement of public disturbance. It derived from the political misdemeanour of sedition, expressed criticism of the Crown, government, or

officials, and was punishable by fines, imprisonment, and the pillory. Prosecutions could be taken with relative ease, with no required proof that the accused caused violence or breach of the peace, unlike the more serious political offence of treason, which required proof of overt acts against the state and involved significant evidentiary and procedural protections for the accused after 1696. Advances such as the *Treason Act*, 1696, the *Habeas Corpus Act*, 1679, and the more general constitutional compromises of the period between parliamentary authority and the Crown were accompanied by the emerging convention of no prior restraint. Proactive press censorship was no longer feasible with the 1694 demise of print licensing and government monopoly over printing. Seditious libel was developed to fill the gap, becoming the most important form of the offence as reformers struggled against governments over the reach of post-publication sanctions.

The courts established the main elements of seditious libel, distinct from the criminal libel of defamation and the parliamentary privilege offence of contempt, by the second quarter of the eighteenth century.<sup>4</sup> These included a minimal burden of proof and judicial control over the most contentious questions. General verdicts were prohibited, and the issues to be decided by the jury were narrowed to the fact of publication and innuendo as suggested by the Crown. Conflicts between juries and judges were highlighted by the famous confrontations between Lord Chief Justice Mansfield and the libertarian defence counsel Thomas Erskine, who urged juries to resist instructions from the bench and use their verdicts as a measure of public opinion of oppressive laws and prosecutions.<sup>5</sup> These cases highlighted the uncertain status of liberties such as freedom of the press and political expression and underscored related legal concerns such as freedom of the jury's verdict, the need for further protections of judicial independence beyond security of tenure, and clearer articulation of the Crown's burden of proof. Fox's *Libel Act*, 1792, a "correction" of the common law that reiterated the powers of the jury to give a general verdict (including matters of intent and seditious inference), represented a partial reform advance. The offence nonetheless continued to have repressive utility, in the 1790s during the reaction to the French Revolution, and as a response to urban disorder in the period 1816-20.<sup>6</sup> However, by the 1820s governments had little confidence in securing compliant juries, and reformers began to advocate the defence of truth in all libel cases, achieved with Lord Campbell's *Libel Act*, 1843.<sup>7</sup>



Although the 1792 and 1843 legislative advances reduced the repressive utility of seditious libel, perhaps the most important check was the threat of jury acquittals, which in turn reflected wider currents in public opinion. These flowed from what Jürgen Habermas has described as the modern public sphere—the development of informed and politically engaged popular opinion through the eighteenth century, fostered by a growing independent press and processes of deliberative democracy outside established institutions, the legitimacy of which British governments began to recognize by the 1820s and 1830s.<sup>8</sup> James Fitzjames Stephen described the resulting transformation in terms of a shift from the traditional presumption that rulers are social superiors who are entitled to deference (and therefore it is wrong to criticize regardless of truth) to a Lockean presumption of popular sovereignty. Governments serve as agents of the people, exercising delegated authority, and could not demand deference but had to earn it (criticism is therefore a right, and only false or demonstrably harmful statements should be sanctioned).<sup>9</sup> The experience of these British struggles informed colonial resistance in the face of prosecutions for seditious libel and related local legislation. As we shall see, the British Constitution and the associated liberties thought to flow from it figured prominently in opposition rhetoric and criticism of colonial governments.

The American situation does not appear to have had much influence on the Canadian and Australian experiences; nor did the US serve as a particularly edifying example during this period. There were similar patterns of repression around an emerging public sphere. The celebrated colonial seditious libel case of John Peter Zenger (1735) did little to restrain similar measures against Loyalists and Quakers during the revolution. The US Bill of Rights and the First Amendment confirmed no prior restraint but did not eliminate seditious libel, despite the teleological impression left in many Whiggish constitutional histories. Jefferson's repeal of the 1798 federal alien and sedition legislation was accompanied by his active encouragement of state jurisdiction prosecutions for the common law offence against political opponents and the press. Despite geographic proximity, the American situation does not seem to have had a direct impact on Upper Canadian reformers (who tended to draw inspiration from British and Irish examples, and whose struggles for responsible government were not significantly republican in nature), or on broader public attitudes, apart from views possibly transmitted by non-Loyalist American immigrants. Despite distance,

Upper Canada and New South Wales had much in common in terms of the direct influence of British experiences and local colonial circumstances.<sup>10</sup>

### The Colonial Background, Reception, and Colonial Institutions

Upper Canada, established in 1791, and New South Wales, established in 1788, differed significantly from each other. Nonetheless, these differences do not overshadow remarkable similarities and parallels between them, highlighted by events examined in detail here. In both colonies, the courts and the administration of justice occupy a central place in political battles, there is common reference to the British Constitution and the rule of law in opposition rhetoric and criticism of government practices, and governments encounter similar pressures from above and below, in the form of imperial supervision and the emergence of local popular public spheres.

Upper Canada was divided off the western part of the colony of Quebec to accommodate Loyalist refugees from the American Revolution. Although promised the image and transcript of the British Constitution, as Lieutenant Governor John Graves Simcoe put it, and granted an elected legislature, regular courts, and the full range of English law, avoidance of perceived mistakes made in the American colonies put a decidedly counter-revolutionary spin on these matters. The legislature was dominated by the appointed upper house, and the executive maintained tight control over office holding and the administration of justice. (Struggles for more accountable government culminated in the achievement of responsible cabinet government after rebellions in Upper and Lower Canada/Quebec in 1837-38, Lord Durham's influential 1839 report, and the electoral dominance of local reform moderates in the 1840s.) The first generation of government leadership had experienced, and therefore tended to regard criticism and organized opposition as a prelude to, revolution, a view reinforced by the French Revolution and the 1798 Irish Rebellion. American expansionism and the vulnerability of British North America's large, easily crossed border, highlighted by the War of 1812, and the related emergence of populist or Jacksonian democracy, reinforced official fears. Although the earliest manifestations of political opposition reflected inter-elite tensions, the emergence of an organized opposition party and a nascent popular movement in the decade before the war was influenced by Irish Whigs who had migrated

after 1798, and drew parallels between the Irish and Canadian conditions of colonial rule and the incomplete implementation of the British Constitution. This development was met by the passage of the *Sedition Act*, 1804, and the silencing of the opposition leadership that included barrister William Weekes (killed in a duel), Judge Robert Thorpe (removed from the bench), and the editor of the colony's first opposition newspaper, Joseph Willcocks (prosecuted for seditious libel and imprisoned for contempt after parliamentary privilege proceedings). The post-war opposition was initially led by Scottish radical Robert Gourlay, who organized constitutional meetings to collect grievances and petition the British government, and whose acquittals in seditious libel trials led to his deportation under the *Sedition Act*. The resurgent opposition of the mid-1820s was accompanied by a broadening public sphere, increasing popular engagement with politics fuelled by a proliferation of independent newspapers, and was met by the measures discussed below.<sup>11</sup>

New South Wales was a convict colony, tightly controlled by the Governor's wide executive powers, and there was little scope for the expression of opposition, although, with the arrival of trained judges in the wake of the Rum Rebellion (1808), the courts soon became a key battleground. The *New South Wales Act*, 1823, checked the Governor's powers with the creation of an appointed Legislative Council (an elected element was introduced only in 1842, a full legislature equivalent to Upper Canada's in 1856) and a formal role for the Chief Justice in supervising colonial legislation. Although transported political convicts (English and Scottish radicals and United Irishmen) were an obvious potential source of opposition, the tight convict regimes limited opportunities for political organization and expression. Resistance, such as the 1804 Castle Hill uprising by Irish convicts, was quickly suppressed by military or police. The Rum Rebellion was a manifestation of inter-elite tensions between Governor William Bligh and John Macarthur's officers of the New South Wales Corps, who formed the nucleus of the Exclusives, a political grouping that grew with the arrival of free settlers. Free settler privileges and the disabilities of those with convict backgrounds were increasingly challenged in the 1820s by the Emancipists, a group including former convicts seeking equal rights and reformers seeking representative institutions and regular jury trials, using the rhetoric of the British Constitution and the rule of law. The emergence of independent newspapers fuelled the opposition and broadened engagement with it, prompting the legal responses examined here.<sup>12</sup>

The common law offence of seditious libel, along with Fox's *Libel Act*, 1792, formed part of the applicable laws in Upper Canada and New South Wales. The colonial reception of English law in overseas British territories acquired through conquest or discovery and occupation is a complex topic bound up with the imposition of an outside political and legal order. There were numerous colonial variations including, for our purposes, Upper Canada and New South Wales.<sup>13</sup> Upper Canada's situation was the more straightforward. The establishment of a legislature and courts in 1791 suggests that year as the "formal" reception date for the full (as opposed to partial and discretionary) application of English common law and legislation in effect at that time. Uncertainty stemming from the province's creation out of the former colony of Quebec (which acquired a legislature and regular courts in 1774) led to an Act passed in 1800 specifying September 1792 (when the legislature first met) as the relevant date, although confusion persisted, notably, for our purposes, over the applicability of the 1792 *Libel Act*.<sup>14</sup> The situation was more uncertain in New South Wales, with an extended period of "informal" reception where applicable English laws were subject to the wide executive discretion of the Governor. The *New South Wales Act*, 1823, confirmed the Chief Justice's function as councillor and his role in certifying local legislation (that it was not repugnant to English law but consistent so far as colonial circumstances would permit). Continued uncertainty about the status of English law led to the passage of the imperial *Australian Courts Act*, applicable to both New South Wales and Van Diemen's Land, which fixed a formal reception date at 1828.

In contrast to the liberalizing British legislation of 1792 and 1843, colonial legislative elaborations of the received sedition and libel laws were decidedly draconian, although subject to imperial review (disallowance or petition) and imperial legislation. Upper Canada's *Sedition Act*, passed in 1804 as permanent legislation, went further than similar temporary British, Lower Canadian, and US measures passed in the shadow of the French Revolution that extended executive powers around the entry and residency of aliens and their associates who engaged in political activity.<sup>15</sup> Aliens and recently arrived British subjects, not permanently resident in the province six months before proceedings were initiated, or who had not taken a provincial oath of allegiance, could be brought before a summary hearing to answer allegations of causing disaffection. Refusal to comply with an executive order to leave the province

constituted an offence for which the accused could be held indefinitely, without access to *habeas corpus*. When the accused was tried and convicted, a sentence of deportation (immediately or after a further term of imprisonment) was confirmed, with further refusal to leave or return punishable by death.<sup>16</sup> The Act purged the province of over four hundred recent American immigrants during the War of 1812, but its most prominent target was Robert Gourlay, noted earlier.<sup>17</sup> As we shall see, repeal by way of petition to the British government in 1829 followed a decade of bills frustrated by the appointed upper house. The New South Wales legislation of 1827, amended in 1830, attempted to regulate the independent press by prior restraint, introducing a registration and licensing system with revocation upon a libel conviction or the Governor's discretion. It also introduced an onerous stamp duty as a secondary means of suppressing the press and added the penalty of banishment from the colony for further libel convictions. As discussed below, Chief Justice Forbes' refusal to certify the licensing provisions, on grounds that included conflict with established British constitutional convention, led to amendments in 1830, but the legislation was effectively disallowed months later by the British government.<sup>18</sup>

Accompanying these repressive colonial laws were issues around their administration. Heavy reliance by colonial governments on criminal prosecutions to fend off challenges and maintain authority was supported by greater executive domination of the administration of justice, resulting in expedients that would not be tolerated in nineteenth-century Britain. However, such domination was constrained because such practices evoked constitutional claims that, as E.P. Thompson observes in the context of the eighteenth-century English criminal courts, were a powerful means to contest repression.<sup>19</sup>

Neither colony benefited from the protections of judicial independence that had developed in Britain, where from 1701 judges held office according to good behaviour determined by Parliament rather than royal pleasure. Colonial judges could be removed at the instigation of executive councils (as was the case of John Walpole Willis in Upper Canada in 1828 and New South Wales in 1843) as well as being recalled. Colonial judges were usually at the centre of government, extrajudicial opinions before trials were routinely sought and given, and chief justices were leading executive and legislative councillors. These practices went well beyond acceptable conventions in Britain from the early nineteenth

century (after Lord Chief Justice Ellenborough's controversial inclusion in the Ministry of All the Talents) and were formalized under the *New South Wales Act*, 1823. Chief Justice Forbes' role is central to the controversies examined here, and though his conflicts with the executive helped promote freedom of the press and separation of powers, they drew critical scrutiny from Colonial Undersecretary James Stephen in the shorter term. Forbes brought the issue of the powers of colonial judges into focus, and Stephen's concerns came to apply to partisan pro-government judges, notably Upper Canada's Chief Justice John Beverley Robinson. Although complaints about Robinson's conduct as Attorney General and role in Willis' removal to Parliament's 1828-29 Canada Committee did not deter his appointment as Chief Justice, they influenced Lord Goderich's 1831 attempt to end the practice of judicial appointments to governing councils. Robinson continued to defy the policy by playing a leading informal role in councils through to the aftermath of the 1837-38 rebellion.<sup>20</sup>

Executive influences extended to the organization of prosecutions and the local administration of justice. Upper Canadian law officers of the Crown effectively monopolized prosecutions and resorted widely to the prerogatives of *ex officio* informations (to bypass grand jury review of charges, leave "hanging threats" of prosecution to induce compliant behaviour, and add powers to change venue and pack juries) and *nolle prosequi* stays (to terminate private prosecutions potentially embarrassing to government). In New South Wales, where there was no obstacle of a grand jury, the absence of a regular indictment process resulted in routine use of informations. This was quite unlike English practice where private prosecutions predominated before the rise of professional policing and the prosecutorial prerogatives were regarded with suspicion as Star Chamber remnants.<sup>21</sup> The colonial executive's appointment powers over officials charged with the local administration of justice (justices of the peace, magistrates, sheriffs, constables) resulted in less autonomous parochial authority than in England.<sup>22</sup> In Upper Canada contention focused on the jury and, in particular (as in Ireland), on the sheriff's control over jury selection and the problem of pro-government jury packing. In New South Wales, there was a protracted struggle for the even more basic liberty of trial by a jury of peers, provisionally achieved in 1833, although military panels continued to be used in the criminal courts until 1839.<sup>23</sup> As we shall see in the cases examined here, military panels were urged to decide cases such as regular juries, but members' independence was almost invariably compromised by their commanding officers.

## UPPER CANADA

My earlier study of sedition prosecutions in Upper Canada indicates nearly fifty cases, which, taking populations into account, exceeded English rates of the period, even during Pitt's "Terror" of the 1790s and the flurry of prosecutions between 1817 and 1819. The most significant and heavily punished cases, noted earlier, took place at ten-year intervals, prosecuted as seditious libel against opposition leaders associated with an independent press.<sup>24</sup> Joseph Willcocks was indicted for seditious libel in 1807, but concerns about a sympathetic jury led to conversion of the prosecution to an *ex officio* information and a related conviction secured by parliamentary privilege proceedings for contempt in 1808.<sup>25</sup> Robert Gourlay, twice acquitted by juries in seditious libel trials in 1818, was unable to contest his deportation the following year under the *Sedition Act*, and a well-managed seditious libel prosecution by *ex officio* information resulted in a ruinous conviction of his editor, Bartimus Ferguson.<sup>26</sup> The Francis Collins case in 1828 lies at the centre of events examined here. Although opposition and the independent press were primary concerns in all these cases, it was unclear how far the colony's public sphere had developed before the 1820s. There is little doubt that widely engaged public opinion had emerged by the time of Collins. Although he was convicted, his case greatly discredited the administration of justice in Upper Canada, resulting in the demise of heavy-handed use of seditious libel and imperial intervention to repeal the *Sedition Act*.

Although there were earlier attempts to establish an independent press, Willcocks' newspaper was the first associated with an organized opposition. Such newspapers saw phenomenal growth in the 1820s, increasing from three in 1819 (two in 1820, after the conviction of Gourlay's editor, Ferguson) to ten by 1830. Jeffrey McNairn's research on the development of public opinion in Upper Canada examines postal records that show high subscription rates, supplemented by the wide availability of newspapers at taverns and hotels, as well as at community reading rooms and libraries run by a growing range of voluntary associations. Subscription rates exceeded those of England outside of London, and estimates based on the second quarter of the nineteenth century suggest that provincial literacy rates approached 80 percent, well above those of English counties and towns. McNairn also illustrates the growing importance of voluntary associations (such as mechanics institutes, agricultural, literary, scientific, and constitutional societies, and the Masons) after the War of 1812. These

organizations not only increased the availability of public information and newspapers but also debated public issues with elaborate rules for discussion.<sup>27</sup> Whereas the earlier sedition prosecutions were a response to organized political opposition and an independent press, the emergence of broader, politically engaged opinion by the 1820s deepened the challenges to privileged claims and control over politics and public policy. Effective defence use of constitutional and rule of law claims and the pivotal role of the jury were evident in the Willcocks and Gourlay affairs, but they had wider popular resonance by the time of Collins.

The 1820s saw a growing public sphere that reflected a shift in public opinion from deference to government to an expectation of free discussion of public measures. Government concerns extended even to the King's Printer, leading one editor of the *Gazette* to be called to the bar of the House and reprimanded for his accounts of parliamentary debates and political reporting, and his successor's loss of appointment for portraying reform too positively. Three independent newspaper editors—Hugh Thomson of the *Upper Canada Herald*, William Lyon Mackenzie of the *Colonial Advocate*, and Francis Collins of the *Canadian Freeman*—became a particular concern for their political commentary. Parliamentary privilege proceedings for contempt were taken against Thomson.<sup>28</sup> The dumping of Mackenzie's press into Lake Ontario by young Tory hooligans, many of whom were law students, along with other incidents of "rough justice" unprosecuted by the Crown and suggesting official complicity with violence against selected reform targets, gave rise to a Legislative Assembly inquiry into the administration of justice and public prosecutions.<sup>29</sup> It heard testimony from the recently arrived Judge Willis, who made much of colonial departures from English practices, questioned their constitutionality, and repeated these charges at the assizes. A related series of articles by Collins revealed yet more about government legal abuses and linked the law officers of the Crown to unprosecuted criminal acts.<sup>30</sup>

Attorney General Robinson expressed caution in contemplating a legal response:

Within a few Years Two Newspapers have been established in this Town, under the Conduct of Men [Collins and Mackenzie] of much less responsible Stations in Society than the editors of Public Journals commonly are ... I always regretted the Tendency which such Publications might have in misleading the Opinions of



People ... and perhaps a Sense of this ought to have induced me, for the sake of the Province, to attempt to put them down by Law ... [but] I feared to call the Papers into Notoriety, and to protract their Existence, by the political Excitements which Prosecutions for Libel usually occasion.<sup>31</sup>

The growing controversy surrounding the Attorney General's partisan conduct compounded matters and explains his reluctance to resort to the expedient of an *ex officio* information, although he was willing to conduct prosecutions by regular indictment upon the Lieutenant-Governor's request or any individuals libelled. As the Home District assize opened on 7 April, the grand jury returned a true bill on the indictment against Collins and another against Mackenzie.<sup>32</sup> Robinson's caution did not, however, extend to anticipating Willis' presence. Just before the trials commenced, Willis permitted Collins to air concerns about Robinson and to lay private charges for alleged acts by government supporters.<sup>33</sup> A furious Robinson withdrew the Collins case to the next assize in October, declaring subsequent press conduct would determine whether the Collins or Mackenzie cases proceeded.

During the summer, the Executive Council recommended Willis' removal and suspended him on the pretext of his challenge to the constitutionality of the King's Bench.<sup>34</sup> A third seditious libel indictment was issued in Kingston when Hugh Thomson of the *Herald* wrote: "This high handed measure plainly shows that judges who hold their appointments during pleasure may not give an opinion contrary to the will of the Executive, without running the risk of being dismissed."<sup>35</sup> The Mackenzie and Thomson indictments were dropped, but Robinson proceeded against Collins when the autumn assize opened on 13 October. Collins tried to postpone the case, pointing out that, in the confusion of the spring assize, he had not been formally arraigned. When this was confirmed, Robinson demanded and won an impossibly high security for Collins' good behaviour, prompting Collins to opt for immediate trial to avoid imprisonment.<sup>36</sup> The jury acquitted, but the Attorney General brought new charges on different evidence — Collins' recently published remarks on Robinson and Judge Hagerman during the trial itself.<sup>37</sup>

The Crown's third crack at Collins came on 25 October before Justice Sherwood (whose son and brother-in-law faced Collins' criminal charges at the spring assize). Collins' counsel, John Rolph, attempted to raise the defence of truth, claiming that the Attorney General had indeed stated

a falsehood in court, and at the end of arguments moved for an immediate acquittal because Robinson refused to read the alleged libels to the jury.<sup>38</sup> Robinson and Judge Sherwood attempted to steer the jury clear of these matters, but the jurors struggled with their verdict, and while they were deliberating, Sherwood left the bench to be replaced by Hagerman (who was allegedly libelled). The jurors gave a verdict of guilty on the libel against the Attorney General only, which Hagerman rejected, instructing them to give a general verdict including the libel on him.<sup>39</sup> The jury eventually complied, and Sherwood returned to sentence Collins to a year's imprisonment and crippling fines, a sentence that the British law officers later declared twice as severe as comparable English cases.

Collins' sentence was challenged by petition to the British government that accompanied a number of other grievances concerning the local administration of justice.<sup>40</sup> Reformers had won an unprecedented number of seats in the 1828 elections, and the Assembly petitioned Willis' dismissal, concerns about executive manipulation of the judiciary and public prosecutions, as well as the upper house's repeated refusal to accept jury reform and *Sedition Act* repeal bills passed by majorities. These matters were considered by the previously mentioned British parliamentary committee, the first of a series of committees on the Canadas in the 1830s. The most immediate result was remission of Collins' sentence and imperial intervention to uphold the eighth bill to repeal the *Sedition Act* in 1829.<sup>41</sup> As noted earlier, Robinson's involvement did not prevent his appointment as Chief Justice, although his continuing political influence drew scrutiny from the Colonial Office in the decade that followed. Willis successfully challenged his own removal on procedural grounds, and his judicial career continued in other colonies.

The Collins affair marked the end of seditious libel prosecutions against the press in Upper Canada. With the exercise of the Crown's prosecutorial authority under intense public scrutiny, the *ex officio* prerogative was no longer a feasible option, and there was little confidence in securing compliant regular juries. The government had failed to marginalize government criticism; on the contrary, repressive proceedings attracted precisely the attention and notoriety Robinson feared. The shift away from seditious libel in Britain in the 1820s is mirrored in Upper Canada in the 1830s, including local legislative debate about the truth defence (later adopted with Campbell's *Libel Act*). A seditious libel prosecution against Mackenzie was contemplated by the Crown law officers

in March 1832, but the Executive Council, concerned about public attention and a jury, deemed it politically inexpedient. Instead, Mackenzie was repeatedly expelled from the Assembly for contempt to prevent him from sitting as an elected member, although such privilege proceedings were no longer taken directly against the press.<sup>42</sup> Even private actions for defamatory libel against the press were questioned if perceived to be a front for government interests, as seen in the 1834 acquittal of George Gurnett, editor of the *Courier*. By the 1830s Upper Canada's public sphere had developed to the point that deference to privileged control over politics was dramatically weakened, and public policy and repressive control of political expression were effectively constrained. As the editor of the *Christian Guardian* put it, "public opinion is the true supporter of the press — and public opinion is the proper and only effectual corrector of its licentiousness."<sup>43</sup> The acceptable standards for political expression were to be set by informed public opinion, not by the government or the Crown prosecutor. For the public, the only legitimate limits on political expression became deliberate falsehoods or advocacy of violence, a development that Robinson and other more astute government leaders were obliged to accept. Prosecuting oppositional political expression served only to put government under the critical scrutiny of the provincial public and the imperial government.<sup>44</sup>

#### NEW SOUTH WALES

From 1824 to 1831, a similar combination of pressures from below and above determined the course of events in New South Wales.<sup>45</sup> The Emancipist struggle for open and accountable institutions broadened into a clash between an emerging public sphere and the quasi-military colonial order. In the absence of representative government, and with legislative councillors sworn to secrecy about proceedings, it is not surprising that many of these conflicts took place in the courts and involved the independent press, an essential forum for broadening engagement with colonial public affairs. As Brendan Edgeworth puts it, "[i]f there was no political forum in which the most important deliberations on matters of public significance in the colony could be the focus of genuine public debate, all that was left was the press."<sup>46</sup>

The *Sydney Gazette*, the sole newspaper for the first quarter century, reflected official perspectives (like its sister in Upper Canada, censored by way of the King's Printer's contract) but did regularize access to information

about government and opened the way to broader engagement with politics and public policy. The *Australian*, the colony's first independent newspaper aimed at reform-oriented free settlers, was established in 1824 by Emancipist leader William Charles Wentworth and edited by Robert Wardell. They had met in London in 1819 and together returned to Australia with a printing press (also becoming the first two barristers admitted to the New South Wales Supreme Court—Wardell sought but failed to be appointed Attorney General). The *Monitor* followed in 1826, edited with evangelical zeal by Edward Smith Hall, and appealed directly to convict readers, urging them to assert their rights as full British subjects. Governor Brisbane had a benign attitude toward the press, ignoring calls to discipline it by way of libel prosecutions. Brisbane's replacement, Governor Darling, arrived in 1825 with warnings about the dangers of the press underscored in imperial instructions from Lord Bathurst. As criticism of government mounted, Darling turned to seditious libel prosecutions and prior restraint through licensing legislation. Conflict with Chief Justice Forbes over the legislation and the conduct of trials was quickly brought to the attention of the British government. Just as Darling's campaign to silence the press and opposition criticism began to encounter local success, the political tide had turned at the imperial level. Pressures from below frustrated Darling's repression, but it was ended by intervention from above.

Brisbane did nothing to oppose Wentworth and Wardell and allowed the editor of the *Gazette* a freer hand as the *Australian* began to outstrip its circulation. The Exclusives placed higher hopes in Darling. Bathurst's warnings raised the possibility of a legislative response and also appeared in instructions to Lieutenant-Governor George Arthur in Van Diemen's Land. Arthur (who became Lieutenant-Governor of Upper Canada during the 1838 rebellion crisis) quickly enacted compulsory licensing and stamp duty legislation, with revocation upon a libel conviction and a wide range of other grounds. Darling hesitated, refusing to act on repeated requests from John Macarthur and Archdeacon Scott to direct the Attorney General to prosecute the editors of the *Australian* and later the *Monitor* and even the *Gazette*. Although, in the absence of legislation, the common law offence of seditious libel was readily available, supported by *ex officio* informations, he had little confidence in the abilities of Attorney General Saxe Bannister. This became evident in the first seditious libel prosecution, taken in August 1826 against Hall of the *Monitor* (for criticism of government intrusions into "ancient rights"), which the

Governor suspended as the case unravelled. In October Saxe Bannister urged a seditious libel prosecution against Wardell for the manner in which the *Australian* reported his resignation as Attorney General. Darling sensibly ignored the call since the libel occurred after Saxe Bannister had left office. A private prosecution for criminal defamation before Justice Stephen failed, as did another before Chief Justice Forbes against the editor of the *Gazette* (Robert Howe, for his description of the ideal qualities of a non-partisan attorney general). The government's restraint emboldened the press, and as public criticism intensified over the months, Darling contemplated his options.<sup>47</sup>

Darling's treatment of army deserters Thompson and Sudds (the latter died in custody) led the *Australian* and the *Monitor* to question the legality of the Governor's actions and raise the larger legacy of the brutal treatment of convicts. Darling, however, continued to lack confidence in his Crown law officers and received a negative advisory opinion from the judges on prosecutions. Returning to his original instructions, Darling concluded that proactive legislation was the best option.<sup>48</sup> The Van Diemen's Land legislation sent to him by Arthur, and already certified as consistent with English law by Chief Justice Pedder, provided a ready-made bill.

The government's purported surprise at Chief Justice Forbes' objections to Darling's legislation, and the prevailing view that his actions were politically motivated, are cast into doubt in a recent biography by John M. Bennett. Forbes enjoyed good relations with Governor Brisbane, who welcomed the colony's first Chief Justice, but Forbes fully recognized the awkwardness that might arise by his inclusion in councils and role in certifying local legislation, which made him a sort of super Lord Chancellor, or "justiciar" as Bennett puts it. He expressed reservations to James Stephen about the mixture of legislative and judicial functions, and the potential pressures on his independence that arose from the 1823 arrangements, concerns that proved well founded as relations with Darling deteriorated.<sup>49</sup> Nearly a year before he was asked to review the legislation, Forbes signalled to Darling that he would not hesitate to use his powers to refuse local measures. When Darling first proposed legislation based on Bathurst's instructions in Executive Council in October and November 1826, Forbes reiterated that he could refuse to certify a bill he found inconsistent with English law, and in December 1826 he expressed clear reservations about measures founded on Arthur's legislation.<sup>50</sup> As Bennett puts it, "[n]o legal precedent was created by Pedder's

certificate and instructions from the Colonial Office to a Governor that he submit specific legislation could not, as a matter of law or practice, enliven the automatic issue of a certificate.”<sup>51</sup>

The Licensing and Stamp Duty Bills were formally submitted to the Chief Justice in early April 1827, and his lengthy opinion two weeks later carefully outlined objections and declared an unwillingness to certify a number of the provisions.<sup>52</sup> Citing Blackstone and Chief Justice Lord Ellenborough as authorities, Forbes noted that prior restraint by way of a licensing system for newspapers was contrary to the laws of England from 1695. A local legislature had assumed unrestricted powers to suppress the established constitutional liberty of the press. Moreover, the Governor’s power to revoke a licence would make him a judge in his own cause. The applicable common law should provide ample correctives against a licentious press. The imperial instructions could not be intended to encourage local legislation but merely envisaged, if prosecutions under the common law proved insufficient, a recommendation from the New South Wales Legislative Council that the imperial Parliament consider enacting such a law.<sup>53</sup> Although Forbes was willing to certify the Bill to introduce a stamp duty on newspaper sales in principle, when the Governor assented to the Bill with a prohibitive amount subsequently added, he retracted his approval on the basis that the real object of the proposed tax was the silencing of newspapers, not legitimate revenue.<sup>54</sup>

The *Australian* broke details of the Bill, and the other newspapers, including the *Gazette*, criticized the measures. The *Australian’s* commentary was similar to Forbes’ confidential opinions, and, suspecting a leak, Darling began sending complaints against the Chief Justice to the Colonial Secretary, who also received a flood of newspapers, letters, and petitions seeking British intervention.<sup>55</sup> The Exclusives initially had the upper hand in this paper war, as Undersecretary James Stephen quickly came to the conclusion that Forbes was “a troublemaker who, inflated with Benthamite ideas of man and society, strained Acts of Parliament to suit his own notions of colonial government” and that “the Chief Justice is the idol of the Newspapers ... whereas the Governor is the object of their unremitting hostility.”<sup>56</sup> However, Forbes’ position on the legislation was vindicated early in 1828 when the law officers in London, agreeing with his ruling that the first six clauses of the licensing legislation were repugnant to the laws of England, upheld the *Stamp Act* levy for legitimate revenue only, not the suppression of the press.<sup>57</sup> As the British political tide turned in the 1830s, Stephen moved beyond

impulsive criticism of Forbes and began to confront the larger problem of colonial judicial independence.

With the frustration of Darling's legislative strategy, the government's only option was to return to libel prosecutions. Forbes himself had noted the absence of such proceedings as one of the grounds for rejecting the licensing system. Prosecutions were fraught with risks, given the public attention whipped up, the competence of the Crown law officers, and deteriorating relations with the Chief Justice. Balanced against this were the surviving certified provisions (the reporting of ownership and authorship, the prompt delivery of all newspaper issues to the Colonial Secretary, the possible sentence of banishment for repeated libel convictions), and the ready availability of the *ex officio* expedient that favoured the government's hand.<sup>58</sup>

The first cases went against the government. Wardell's libel prosecution in June 1827 for an article criticizing abuses in the quarter sessions court collapsed on technical grounds, and Forbes touched the nerve of the colony's lack of trial by jury by urging the military panel to deliberate as if it were a regular English jury of peers. Wardell was back in the courts in September on new charges of seditious libel stemming from commentary that suggested improper motives and conduct on the part of the Governor. Wardell made much of Forbes' prior direction that the panel should conduct itself as a regular jury, and Forbes permitted him wide scope in conducting his own defence, resulting in a "hung" military panel and acquittal. A third prosecution in December 1827 for the *Australian's* publication of a letter critical of the Governor again resulted in a hung panel.<sup>59</sup> The Crown law officers blamed the latitude given to Wardell in his jury addresses and Forbes' charges to the panel. At the end of 1827, the Judges wrote to Darling that "[w]e do not think that the cases selected for prosecutions in this Colony would have been deemed of sufficient importance to have demanded State prosecution in England" and expressed concern about possible defamation in the *Gazette's* reporting.<sup>60</sup>

Darling encountered greater success in 1828 and 1829, although the first foray against Hall in July 1828 failed when the Chief Justice ruled that charges of violating upheld provisions in the 1827 legislation were inapplicable, since the *Monitor's* change in format from newspaper to magazine took it outside the terms of the Act.<sup>61</sup> A dispute with Archdeacon Scott over access to a pew resulted in Hall's successful civil action, but his attack on Scott and his political associates in the *Monitor* negated

the victory. It drew an *ex officio* information for seditious libel by a government emboldened by the arrival of a third more compliant Supreme Court Judge, James Dowling.<sup>62</sup> Hall conducted his own defence with rather less skill than the barrister Wardell, and Dowling's summing up emphasized the Court's responsibility to curb press licentiousness.<sup>63</sup> Hall's conviction led to more seditious libel prosecutions before Dowling. The *Gazette's* resurrection of the Sudds affair, in the attempt to clear Darling, prompted Attwell Hayes, the new editor of the *Australian*, to attack the Governor's fitness for office. Although Hayes was skilfully defended by Wentworth, the latter's petition to the British government, calling for Darling's impeachment and indictment for murder, undermined his advocacy, and Hayes was convicted. Wentworth then attacked the selection, legality, and constitutionality of a military "jury." Although this resonated with the Chief Justice's earlier charges to panels, and Wentworth helped spark the struggle for trial by jury over the coming years, all three Supreme Court Judges upheld the conviction.<sup>64</sup> Hayes received six months' imprisonment. His fines were paid by public subscription, and he continued to edit the *Australian*.

Meanwhile, the campaign continued against Hall, who had not been deterred by his conviction and lenient sentence. He was convicted in April 1829 on two charges of seditious libel (against the Governor and the Commandant at Port Macquarie) and received fifteen months of imprisonment. Like Hayes, Hall continued to edit his paper, resulting in another set of trials on four charges of seditious libel in December 1829, a further cumulative sentence of two years, and crippling fines for violating earlier recognizances for good behaviour.<sup>65</sup> Darling also exercised his executive powers widely, revoking convict assignments in March 1829 of an *Australian* journalist and the foreman printer of the *Monitor*, in defiance of a Supreme Court ruling that called into question his unfettered discretion in such matters.

Although the Colonial Secretary had warned both Darling and Forbes of the possibility of recall in 1828, the Governor's dispatches complaining of the press, opposition, and Forbes were unrelenting and continued after Wentworth's impeachment petition. Just as Darling seemed to have won his battle against the local press in 1829, he began to lose the war at the imperial level. The Colonial Office concluded that he was mishandling the situation, and political change, with the fall of the Tories under Wellington and the rise of the Whigs under Grey, was decisive.<sup>66</sup> In January 1830 the colonial government enacted an amended version of



the newspaper legislation, with the uncertified sections removed but with the banishment provision strengthened by making the punishment automatic rather than a matter of judicial discretion. However, the British government had just repealed a discretionary banishment provision originating in the 1819 *Six Acts*, rendering the colonial provision repugnant to English law, and the legislation was disallowed in January 1831. Colonial Secretary Goderich informed Darling that prior restraint of the press would not be permitted, that the existing common law was more than sufficient, and that it should be used circumspectly. Hall was released from prison in February, two years early, and Darling was recalled later in the year.<sup>67</sup>

The repressive measures against the press by Darling and the Exclusives had failed to curb opposition and the emerging colonial public sphere. The authoritarian politics of the colony could not be reconciled with open political expression and popular engagement with public affairs or the formation of public opinion, judgment, and criticism. As in Upper Canada, the colonial governing elite could not turn back these local developments, especially with the liberal reform ascendancy at Westminster and Whitehall.<sup>68</sup>

## CONCLUSION

The similar legal, constitutional, and political issues in Upper Canada and New South Wales in the 1820s demonstrate the rich potential for comparative legal historical research within the nineteenth-century British Empire. To be sure, there were important points of difference. A colony dominated by the management of transported convicts was quite distinct from one created to reward Loyalists. Although the courts were an important site of struggle in both colonies, the existence of an elected legislature in Upper Canada meant that such struggles occurred in a wider range of institutional sites and moved more quickly from inter-elite conflicts to a broader base. Judges proved to be a greater obstacle to government ambitions in New South Wales than in Upper Canada. As John McLaren notes, judges brought into New South Wales from elsewhere in the empire were more “varied in their political and social philosophies and their attitudes towards colonial conditions,” whereas Upper Canadian judges were drawn largely from local elites.<sup>69</sup> Equally capable, Francis Forbes was an independent-minded outsider, John Beverley Robinson a consummate insider.

Despite such differences, the similar issues and patterns around the emergence of opposition, an independent press, and libel prosecutions speak to the common importance of law in the politics of the period. The centrality of the courts, highlighted some time ago by H.V. Evatt, has been recognized more recently by Canadian historians. A related element, noted by McLaren and others, is the prominence of claims associated with the rule of law and the British Constitution in opposition rhetoric. Events in both colonies not only brought the problem of judicial independence to the fore but also illuminated related issues concerning prosecutions and the jury. Executive domination over the colonial administration of justice nonetheless proved an uncertain advantage when challenged forcefully by way of these formal legal and constitutional claims.

The events examined here show a pattern of determined colonial governments “winning key battles but losing the war” when faced with similar pressures from below and above. Governments encountered increasing resistance in the 1820s in their attempts to manage opposition and critical political expression in the face of a proliferating independent press and emerging colonial public spheres. This tide could not be turned back, with political ascendancy of reform in London, a more open ear to colonial grievances, closer supervision of colonial political and legal affairs, and the increasing influence of utilitarian ideas in the Colonial Office. Through a combination of pressures from below and above, routine prosecutions for seditious libel and related measures were rendered moribund, a setback to the colonial elites and an important step toward pluralistic political cultures and democratic advances in Canada and Australia. Unfortunately, the offence was not eliminated altogether, and in situations of crisis, later governments supported by compliant public opinion could and did make use of it well into the twentieth century.<sup>70</sup>

The nonetheless significant advances achieved by the 1830s would not have been possible without the contestable potential of law and the increasingly effective use of formal constitutional and legal claims to check colonial governments. Their discursive prominence in colonial political and legal struggles and their effectiveness suggest the validity of Thompson’s assertion about how such formal claims check the repressive potential of the law.<sup>71</sup> Habermas’ concept of the public sphere, the colonial emergence of popular deliberative democracy outside established institutional politics, and the key role of the press in developing public opinion

helps to make further sense of the social meanings of these proceedings.<sup>72</sup> The role of the jury as a barometer of emerging public opinion, its reform a preoccupation in Upper Canada, and its very implementation a key struggle in New South Wales certainly warrants further research. So too, the imperial networks, beyond critical re-examination of the political and bureaucratic pressures of imperial reconfiguration to include the impact of political and legal personnel and ideas circulating between the colonies. Upper Canada and New South Wales were not isolated backwaters but were connected to larger developments, and their remarkably parallel and contemporaneous experiences are suggestive of the rich potential for further comparative research.